Supreme Court, U.S.
FILED
AUG 10 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1947

In the Supreme Court of the United States

OCTOBER TERM, 1987

QUALITY ALUMINUM PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID FLEISCHER
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded, in the circumstances of this case, that petitioner's unfair labor practices precluded the holding of a fair election and therefore warranted the issuance of a bargaining order based on authorization cards.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Franks Bros. v. *NLRB*, 321 U.S. 702 (1944)	5
Justak Bros. & Co. v. *NLRB*, 664 F.2d 1074 (7th Cir. 1981)	7
NLRB v. *Appletree Chevrolet*, 608 F.2d 988 (4th Cir. 1979)	8
NLRB v. *Gissel Packing Co.*, 395 U.S. 575 (1969)	5, 6, 7
NLRB v. *Gordon*, 792 F.2d 29 (2d Cir. 1986), cert. denied, No. 86-392 (June 8, 1987)	7
NLRB v. *Horizon Air Services, Inc.*, 761 F.2d 22 (1st Cir. 1985)	7
NLRB v. *K&K Gourmet Meats, Inc.*, 640 F.2d 460 (3d Cir. 1981)	7
NLRB v. *Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967)	5
NLRB v. *Maidsville Coal Co.*:	
693 F.2d 1119 (4th Cir. 1982)	7
718 F.2d 658 (4th Cir. 1983), cert. denied, 465 U.S. 1079 (1984)	7, 8
NLRB v. *Permanent Label Corp.*, 657 F.2d 512 (3d Cir. 1981), cert. denied, 455 U.S. 940 (1982)	7
NLRB v. *Pilgrim Foods, Inc.*, 591 F.2d 110 (1st Cir. 1978)	8
Red Oaks Nursing Home, Inc. v. *NLRB*, 633 F.2d 503 (7th Cir. 1980)	8
Sinclair Co. v. *NLRB*, 395 U.S. 575 (1969)	6
United Oil Mfg. Co. v. *NLRB*, 672 F.2d 1208 (3d Cir.), cert. denied, 459 U.S. 1036 (1982)	7

Statute: Page

National Labor Relations Act, 29 U.S.C. (& Supp. III) 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 3
§ 8(a)(3), 29 U.S.C. 158(a)(3) 3

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-1947

QUALITY ALUMINUM PRODUCTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-6a) is reported at 813 F.2d 795. The decision and order of the National Labor Relations Board (Pet. App. 7a-19a) are reported at 278 N.L.R.B. No. 49.

JURISDICTION

The judgment of the court of appeals was entered on March 20, 1987. The petition for a writ of cer-

tiorari was filed on June 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures and sells aluminum doors and windows (Pet. App. 23a). This is a seasonal business, and petitioner regularly lays off employees during its slack period in the winter (Pet. App. 24a-25a, 26a).

On November 22, 1982, three of petitioner's employees signed and distributed to other employees authorization cards they had obtained at Union [1] headquarters (Pet. App. 8a-9a, 24a). The following day seven employees attended a Union meeting (*id.* at 9a, 24a). By November 24, a majority of petitioner's employees had signed authorization cards (*id.* at 10a, 42a) and the Union requested that petitioner recognize it as the employees' bargaining representative. Petitioner refused to do so (*id.* at 24a).

Most of the employees who had signed authorization cards wore Union buttons to work on November 24 (Pet. App. 9a, 24a). On that day, Warehouse Supervisor Charles Fox made four anti-union statements to employees. First, he told an employee who was wearing two Union buttons that " 'these mother ———— wouldn't be wearing them buttons if it wasn't for that bitch back there in the back' "—a reference to one of the leading Union partisans. About an hour later, Fox stated to the same person that " '[the employees] were fools for signing those union cards' " (*id.* at 9a, 26a (quotation marks and

[1] General Drivers, Warehousemen and Helpers, Local Union No. 89, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

brackets in original)). Fox also told an employee, in the presence of two others, that " 'if he didn't want to jeopardize his job, he'd better take the buttons off' " (*id.* at 9a, 27a (quotation marks in original)). He subsequently told the two employees who heard the preceding statement that petitioner would "close the doors" or "shut the doors" if the Union came in (*id.* at 9a, 27a).

Petitioners laid off six of the 17 to 19 employees who comprised the appropriate bargaining unit:[2] three on November 24; two more on the next working day, November 29; and a sixth employee on December 1 (Pet. App. 9a-10a, 31a-36a). All six laid-off employees had signed Union authorization cards and had worn Union buttons to work on November 24; five had attended the November 23 union meeting, and two had distributed cards to other employees (*ibid.*).

2. The Board found that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by creating the impression of surveillance of union activities, by threatening employees with discharge for wearing union buttons, and by threatening employees with plant closure (Pet. App. 8a, 29a), and that petitioner violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158 (a)(3) and (1), by laying off six employees because of their union activities (Pet. App. 8a, 38a-39a). The Board further found that petitioner's unfair labor practices impeded the election process to such an extent that traditional remedies could not ensure a fair election, and that employee sentiment, as in-

[2] The bargaining unit consisted of petitioner's production, maintenance, warehouse, and truckdriver employees (Pet. App. 42a-43a).

dicated by the authorization cards signed by a majority of the unit employees, would, on balance, be better protected by a bargaining order (*id.* at 8a-15a). In so finding, the Board relied on the following facts: the violations were "extensive in number and pervasive in terms of the number of unit employees they affected" (*id.* at 10a); the violations were "highly coercive" (*ibid.*); and the bargaining unit was small (*ibid.*). The Board also relied on the swiftness and timing of the unfair labor practices (*id.* at 11a), the lingering coercive impact of the unfair labor practices in view of the continued presence of most of the employees affected (*ibid.*), the likelihood of future layoffs, which would lead employees to fear a repetition of the unlawful conduct (*id.* at 11a-12a), and the absence of any change in management or disavowal of the unlawful threats (*id.* at 12a). The Board further concluded that the passage of time was not sufficient to eradicate the lasting effects of petitioner's conduct (*id.* at 13a). To remedy the unfair labor practices, the Board ordered petitioner, inter alia, to bargain with the Union (*id.* at 16a).

3. The court of appeals upheld the Board's findings and enforced its order (Pet. App. 2a-6a). The Court found that substantial evidence supported the Board's findings of violations and that the Board did not abuse its discretion in determining that a bargaining order was an appropriate remedy (*id.* at 4a). Judge Krupansky dissented. He said that while he could join in affirming the Board's finding that petitioner committed unfair labor practices, he did not agree with the remedial measures the Board had ordered (*ibid.*).

ARGUMENT

Petitioner does not challenge the court of appeals' conclusion that substantial evidence supported the Board's finding that petitioner in fact unlawfully threatened to close the plant and to discharge union supporters and then unlawfully selected employees for lay-offs because of their union activities. Rather, petitioner contends that the court erred in sustaining the Board's decision that petitioner must meet and bargain with the Union on request. Pet. 3-4. But the court's decision is correct and does not conflict with any decision of this Court or with the decision of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. In *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), this Court held that the Board may order an employer to bargain with a union not selected in a board election both in "'exceptional'" cases marked by "'outrageous' and 'pervasive' unfair labor practices" (395 U.S. at 613-614, quoting *NLRB* v. *Logan Packing Co.*, 386 F.2d 562, 570 (4th Cir. 1967)), and in cases "marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes" (395 U.S. at 614). The Court found that precluding the Board from issuing bargaining orders in such circumstances "would in effect be rewarding the employer and allowing him 'to profit from [his] own wrongful refusal to bargain'" (395 U.S. at 610, quoting *Franks Bros.* v. *NLRB*, 321 U.S. 702, 704 (1944)). Thus, the Court indicated that the Board may order an employer to bargain with an unelected union whenever it finds "that the possibility of erasing the effects of past practices and of ensuring a fair election * * * is slight and that

employee sentiment once expressed through [authorization] cards would, on balance, be better protected by a bargaining order" (395 U.S. at 614-615).

The decision below follows straightforwardly from *Gissel*. The court found substantial evidence to support the Board's findings that a fair election could not be assured by traditional remedies and that a bargaining order was appropriate in light of petitioner's unlawful threats of plant closure and job loss and petitioner's realization of those threats by laying off approximately one-third of the unit employees. Since these are precisely the circumstances in which the Court in *Gissel* contemplated that the Board would issue a bargaining order—to prevent an employer from "delay[ing] or disrupt[ing] the election processes [or from] put[ting] off indefinitely his obligation to bargain" (*NLRB* v. *Gissel Packing Co.*, 395 U.S. at 610-611 (footnote omitted))—the court's decision to uphold such an order was correct. Indeed, in one of the companion cases decided with *Gissel* (*Sinclair Co.* v. *NLRB*, 395 U.S. 575, 587-590, 615 (1969)), the Court affirmed a decision of the First Circuit enforcing a Board-issued bargaining order that was based solely on threats of plant closure.[3]

2. Petitioner contends (Pet. 4) that the courts of appeals have adopted "divergent interpretations of

---

[3] Petitioner suggests (Pet. 3) that the impact of its unlawful layoffs was minimized by the fact that it regularly laid off employees due to the seasonal nature of its business. However, as the Board stated (Pet. App. 11a-12a), the regularity of layoffs exacerbated the lingering effect of petitoner's selection of employees for layoff based on their union activities: "With future seasonal layoffs likely, the [petitioner's] employees have reason to fear a recurrence of a similar attempt."

the application of the *Gissel* criteria." This contention has no merit.

The courts of appeals do not need any additional instruction from this Court concerning the findings and analysis that the Board must make to justify issuance of a *Gissel* bargaining order. The courts uniformly hold that the Board may issue a bargaining order only if it explains why a fair and reliable election cannot otherwise be conducted. See, *e.g.*, *NLRB* v. *Permanent Label Corp.*, 657 F.2d 512, 521 (3d Cir. 1981) (en banc), cert. denied, 455 U.S. 940 (1982); *NLRB* v. *Maidsville Coal Co.*, 718 F.2d 658, 659-661 (4th Cir. 1983) (en banc), cert. denied, 465 U.S. 1079 (1984); *Justak Bros. & Co.* v. *NLRB*, 664 F.2d 1074, 1081-1082 (7th Cir. 1981); *NLRB* v. *Horizon Air Services, Inc.*, 761 F.2d 22, 30 (1st Cir. 1985); *NLRB* v. *Gordon*, 792 F.2d 29, 33 (2d Cir. 1986), cert. denied, No. 86-392 (June 8, 1987).[4] There is no doctrinal confusion for this Court to clear up. In this case, the Board set forth in detail the factors upon which it relied in concluding that petitioner's unfair labor practices would have a lingering

---

[4] Petitioner's assertion of a conflict rests largely on panel decisions that have been superseded by en banc decisions. Thus, the suggestion of "hostility" to bargaining orders in *NLRB* v. *K&K Gourmet Meats, Inc.*, 640 F.2d 460 (3d Cir. 1981) (see Pet. 5) has been dispelled by the en banc opinion in *NLRB* v. *Permanent Label, supra*; see *United Oil Mfg. Co.* v. *NLRB*, 672 F.2d 1208, 1213 (3d Cir.), cert. denied, 459 U.S. 1036 (1982). Similarly, the panel decision in *NLRB* v. *Maidsville Coal Co.*, 693 F.2d 1119 (4th Cir. 1982), on which petitioner also relies (Pet. 6), was withdrawn on rehearing en banc, and the Board's bargaining order was enforced. 718 F.2d 658, 659-661 (4th Cir. 1983), cert. denied, 465 U.S. 1079 (1984).

effect and would preclude the holding of a fair election.[5] No court of appeals requires the Board to do more.

---

[5] The cases petitioner cites (Pet. 6-7), in which courts of appeals have denied enforcement of Board orders, are distinguishable. In *NLRB* v. *Appletree Chevrolet*, 608 F.2d 988, 997-998 (1979), which predates the Fourth Circuit's en banc decision in *Maidsville Coal*, the Board had made no findings as to the residual impact of the unfair labor practices or the potential impact of traditional remedies. Moreover, the court reversed the finding of discriminatory discharges that was the principal basis for the Board's bargaining order. 608 F.2d at 992-996, 998. In *NLRB* v. *Pilgrim Foods, Inc.*, 591 F.2d 110, 119-120 (1st Cir. 1978), the Board also used only conclusory language; it was silent as to the future impact of the unfair labor practices and did not explain why traditional remedies would be inadequate in the circumstances. In addition, the supervisor who committed the unfair labor practices had left the company's employ along with four of the eight unit employees, and the violations ceased when higher management was apprised of them. *Id.* at 120. Similarly, in *Red Oaks Nursing Homes, Inc.* v. *NLRB*, 633 F.2d 503, 509, 511 (7th Cir. 1980), which involved neither unlawful discharges nor layoffs, the Board made only conclusory statements and failed to consider the relevant factors.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

DAVID FLEISCHER
Attorney
National Labor Relations Board

AUGUST 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40471